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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1435

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Local 336, International Brotherhood of Electrical Workers, AFL-CIO, respectfully requests that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 21, 1978 and the subsequent order denying the Petitioner's request for rehearing, entered on December 19, 1978. The orders of the Court of Appeals for the Seventh Circuit affirmed the order of the United States District Court for the Northern District of Illinois, entered on January 31, 1978.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit was unpublished, pursuant to Circuit Rule 35. The decision of

the District Court is unreported. True and accurate copies of both decisions appear in the Appendix hereto.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the question of mootness of a grievance under the collective bargaining agreement is to be determined by a Court or an Arbitrator; and

2. Whether the scope of the issues raised by a grievance under a collective bargaining agreement is to be determined by a Court or an Arbitrator.

UNITED STATES STATUTES INVOLVED.

United States Code of Arbitration, Title 9 U. S. C., Section 4.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being

satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Labor-Management Relations Act, Section 301, Title 29 U. S. C., Section 185(a):

§ 185. Suits by and against labor organizations
Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

The Original Petition to Enforce Arbitration.

On March 2, 1976 the Petitioner labor organization filed a petition in the United States District Court seeking an order to compel arbitration of a grievance processed by the Petitioner under the terms of a collective bargaining agreement with the Respondent Employer. Jurisdiction of the District Court was forwarded pursuant to the provisions of the United States Arbitration Act and Section 301 of the Labor-Management Relations Act.

The Grievance.

The underlying grievance was multi-faceted. The subject bargaining unit consists of skilled installers of central office telephone equipment for affiliated companies of General Telephone and Telegraph Company and independent companies in the telecommunications industry.

The grievance was filed in 1975 after the Petitioner learned that members of the bargaining unit were being solicited by the Respondent to accept two year temporary assignments to Iran in connection with a contract procurred by General Telephone to install telephone central office equipment in that country.

In its written grievance submitted prior to the actual assignments, the Petitioner contended that the Respondent had violated the bargaining agreement by:

1) Unilaterally establishing the terms of hours, wages and working conditions for the employees while on temporary assignment to Iran;

2) Not negotiating with the Petitioner over the effect of said temporary assignment upon the seniority and related rights of such employees during and after the completion of the temporary tour; and

3) The refusal of the Respondent to recognize the scope of the Petitioner's bargaining unit under their collective bargaining agreement as including assignment of installers outside the "forty-eight" mainland states.

The Respondent refused to agree that any or all of the issues raised by the Petitioner were "arbitrable". The Respondent also refused to submit the issue of "arbitrability" to an impartial arbitrator.

The Intervening Decision of the National Labor Relations Board.

After the Petitioner initiated suit in the District Court, the Respondent filed a unit clarification petition ("UC" petition) with the National Labor Relations Board, seeking a determination by the Board that the Petitioner's jurisdiction, under its collective bargaining agreement with the Respondent, did not extend beyond the forty-eight mainland states.

While the "UC" Petition was pending, the Respondent successfully obtained stay orders from the District Court pending a final ruling by the Board. During this interim period, the temporary assignments were effectuated, including several employees who were returned to the States from Iran on both a voluntary and involuntary basis. On November 30, 1976, the Board rendered its decision in the "UC" case, *GTE Automatic Electric Incorporated* and *Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO*, 226 NLRB No. 197 (1976). The Board determined that the Petitioner's jurisdiction for representation could not extend to the employees while they were in Iran. In a footnote, NLRB member Jenkins noted, however, that the decision should not extend to the employees' representation rights with respect to negotiations over the employees' hours, wages and working conditions while in Iran and the retention of their seniority rights, including reemployment rights

upon their return to the United States. (Fn. 2, 226 NLRB 1223).

While the Board proceeding was pending and the action in the District Court was stayed, employees were temporarily assigned to Iran and in some cases involuntarily returned to the United States before their two year tour in Iran was completed.

The Respondent refused to reinstate the employees involuntarily returned to the United States to active employment in the bargaining unit, although the Petitioner sought their reinstatement, or, in the alternative, demanded arbitration of the issue. In numerous status calls and pleadings submitted by the parties to the District Court following the Board decision, the Court was fully and repeatedly advised that because of the passage of time, the Board decision and subsequent negotiations, the only remaining issues dividing the parties were:

1) The right of employees involuntarily returned from temporary overseas assignments outside of the Petitioner's jurisdiction as the bargaining representative to reassignment within the bargaining unit, or, at least, the right to have that question resolved through impartial arbitration under the parties' collective bargaining agreement; and

2) The right to submit the above question to impartial arbitration for one such employee who had been involuntarily returned from temporary assignment to Iran.

The District Court Decision.

The District Court rendered a final decision on January 31, 1978, dismissing the Petitioner's suit for "mootness", holding that the decision of the Board in the "UC" petition and subsequent collective bargaining between the parties had resolved all outstanding issues.

The Decision of the Court of Appeals.

The Court of Appeals affirmed the District Court's decision that the issues had been rendered moot. Additionally, the Court

of Appeals held that ". . . the rights of employees who prematurely leave their foreign assignment . . ." had not been the subject of the lawsuit and the Union had not availed itself of the grievance procedure of the bargaining agreement, citing *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); and *Vaca* v. *Sipes*, 386 U. S. 171 (1967).

REASONS FOR GRANTING THE WRIT.

The Proper Determination of "Mootness" of a Grievance Is Fundamentally a Matter of Contract Interpretation and Application Which Should Be Referred to Arbitration.

The Court of Appeals did not hold that there was not a live contract issue between the parties concerning the rights, if any, of an employee involuntarily returned from an overseas assignment to be restored to active employment within the bargaining unit. Rather, the Court of Appeals concluded that this issue was not encompassed within the Petitioner's grievance which had been stayed for almost two years before the District Court held that all outstanding issues were moot.

Furthermore, there is nothing in the record before the Court of Appeals by which one could conclude that the Respondent and the District Court were not fully advised by the Petitioner of the remaining contract issue and the Respondent's refusal to arbitrate.

Thus, the Court of Appeals has significantly extended the scope of the Court's function in determining that jurisdiction should not lie with an arbitrator, at least in the first instance. In effect, the Court of Appeals has assumed responsibility, without any record of evidence, of interpreting and applying substantive provisions of the bargaining agreement by determining that:

1) The grievance originally filed by the Petitioner and ensuing written and oral communications between the parties over the next two years did not fairly comply with the contract's

procedure so as to allow a hearing on the merits over the remaining issue and its application to a single employee. In this regard, it should be noted that the District Court did not consider the question or develop a record that the Petitioner had not complied with the grievance procedure; and,

2) Determining that the grievance raised by the Petitioner back in 1975 at the inception of the Respondent's action, in arranging and setting the terms of the temporary assignments to Iran, did not encompass the effects of such actions upon members of the bargaining unit.

The issues of "mootness" and the scope of the grievances raised and processed by the Petitioner are interrelated. The key consideration is that the Court of Appeals has assumed the responsibility of interpreting and applying the perimeters of a grievance without a hearing, by declaring the Petitioner's action moot after the Petitioner was subject to stay orders for a two-year period. We are not aware of any decision of the Supreme Court of Appeals which confers upon the judiciary, rather than an arbitrator, the basic determination of the scope of a grievance when the issue raised by a party is clearly and legitimately a matter for contract interpretation and application. *United Steelworkers of America* v. *American Manufacturing*, 363 U. S. 564, 46 LRRM 2414 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 46 LRRM 2432 (1969); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574, 46 LRRM 2416 (1961); *Operating Engineers* v. *Flair Builders, Inc.*, 406 U. S. 487 (1972); *Tobacco Workers* v. *P. Lorrilard Corp.*, 448 F. 2d 949 (C. A. 4, 1971); *Mine Workers* v. *Dow Corning Corp.*, 459 F. 2d 221 (C. A. 6, 1972); *Technical Engineers* v. *Western Electric Co.*, 508 F. 2d 106 (C. A. 7, 1974); *Machinists* v. *Howmet*, 466 F. 2d 1249 (C. A. 9, 1972).

CONCLUSION.

The effective right of an employee to a hearing to regain his employment will be denied if the Supreme Court does not grant this Petition.

Beyond the impact upon the individual is the overriding policy question which merits review by the Supreme Court. The decision of the Court of Appeals invites litigation as a substitute for arbitration, the preferred forum expressed by Congress in the National Labor Relations Act. The effect of the Court of Appeals' decision is to require the parties to engage in protracted and expensive litigation in advance of arbitration in which procedural and substantive issues may be aired in a single, expeditious proceeding.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued November 9, 1978

November 21, 1978

Unpublished Order not to be cited per Circuit Rule 35

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

HON. HARLINGTON WOOD, JR., *Circuit Judge*

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner-Appellant,

No. 78-1372 *vs.*

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 C 781

George N. Leighton, *Judge.*

ORDER

This is an appeal from the dismissal of a cause of action seeking to order arbitration, commenced under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 and the Arbitration Act, 9 U. S. C. § 4.

I

The respondent, GTE-Automatic Electric Incorporated (Company) and GTE International Incorporated (International) are independent wholly owned subsidiaries of General Telephone & Electronics Corporation. In April, 1975, International contracted with a company owned by the government of Iran to sell and install telephone equipment. A subsidiary of International, GTE Iran Incorporated, was responsible for the installation within Iran and employed all the installers working in Iran.

Approximately one-third of the total number of employees involved in the Iran project were from the Company. None of these employees were assured reemployment by the Company upon their return to the United States.

The Company and Local 336 of the International Brotherhood of Electrical Workers, A. F. L.-C. I. O. (Union) were parties to a collective bargaining agreement (Contract) effective August 1, 1973 through August 1, 1976, which recognized the Union as the exclusive bargaining representative subject to the National Labor Relations Act for all of the Company's employees employed as telephone equipment installers, but excluding office and clerical employees, guards and professional and supervisory employees, confidential employers, managerial employees, and all other employees not specifically included.

Approximately 850 installers employed by the Company in the United States were covered by the Contract. About 59 installers were employed by GTE Iran Incorporated in Iran.

On November 10, 1975, the Union proposed that an arbitration panel be convened pursuant to the Contract relative to the Union's right to negotiate wages, hours and working conditions of certain employees stationed in Iran. The Union also took the position that the Company had an obligation to negotiate with the Union relative to the effects on the remainder of the bargaining unit should these employees in Iran return to the United States and resume work covered by the Contract.

The Company took the position that employees stationed in Iran were not covered by the Contract and that therefore there was no contractual dispute to be arbitrated. The Union responded on January 14, 1976, by broadening its position to include "all foreign assignments, not just Iran" and reiterated the issues it contended were arbitrable as follows:

> [T]he Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries . . . [and] the Company has an obligation to bargain with respect to the effect these members would have on other members of the bargaining unit when they returned to the States.

An impasse having been reached, on March 2, 1976, the Union filed this action in the district court, incorporating and attaching its letters of November 10, 1975 and January 14, 1976, both of which clearly specified the two questions at issue: (1) the wages, hours and working conditions of members assigned to foreign countries and (2) their effect on the remainder of the bargaining unit when they returned to the United States.

II.

Following the filing of the complaint, the Company filed with the National Labor Relations Board a petition seeking clarification of the bargaining unit. A hearing was held and on November 30, 1976, the Board entered its decision and order that the bargaining unit was "clarified by excluding from the unit telephone equipment installers employed on projects in foreign countries outside the United States." 226 NLRB 1222. One of the three Board members while agreeing that the Union could not bargain for its members in foreign countries, dissented, 226 NLRB 1223, n. 2.[1]

1. Note 2 reads: "Member Jenkins agrees that the union cannot bargain for its members with respect to their wages, hours, and working conditions in foreign countries. He would deny the petition

(Footnote continued on next page.)

After the parties learned of the Board decision, they engaged in further collective bargaining, which resulted in the following agreement:

> An employee who is transferred to an installer position in geographic locations outside the bargaining unit will maintain the seniority accumulated at the time of transfer but will not accumulate seniority for any time spent in this position. An installer being reassigned to the bargaining unit will be placed on the recall list of the Area from which transferred and will be recalled in accordance with his maintained seniority within the same time limitations set forth for recall rights. An installer recalled in accordance with the foregoing may be given wage progression credit.

Thereupon the Company moved to dismiss for mootness, based on the NLRB decision and the above negotiated agreement. On January 31, 1978, the district court dismissed the suit on the ground that all issues raised by the Union for arbitration are now moot. The Union has appealed.

III.

We affirm the court's judgment. The NLRB determined the first issue, bargaining rights of foreign employees, and the parties negotiated the second, namely the effect that foreign assignments

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(Footnote continued from preceding page.)
seeking clarification of the bargaining unit, however, because employees in the unit who are on temporary assignment to work in foreign countries retain many interests in the conditions of employment in the unit in the United States. There was testimony indicating they are in layoff status while on temporary foreign assignment and, in this respect, they clearly remain members of the bargaining unit. They are entitled to bargaining representation with respect to such matters as the terms of their transfer to foreign countries, their retention of seniority rights, their rights to be returned to the United States, and their reemployment rights. The fact that the Employer need not bargain about the terms and conditions of their employment in Iran hardly relieves it of the duty to bargain about such other matters as those mentioned. For these reasons, Member Jenkins would not exclude from the unit employees on temporary assignment in foreign countries and would dismiss the petition."

have on the remainder, or other members, of the bargaining unit. The Union on appeal has sought to add a new issue: the rights of employees who prematurely leave their foreign assignment or are discharged from foreign employment. The pleadings were never amended nor sought to be amended to encompass this new issue. Board Member Jenkins' dissent in the Board case did not change the issues before the district court. Equally importantly, the Union has not availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration. *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965); *Vaca* v. *Sipes*, 386 U. S. 171 (1967).

Judgment affirmed.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Local 336, International Brotherhood of Electrical Workers, AFL-CIO, *Petitioner,* *vs.* GTE-Automatic Electric Company, *Respondent.*	76 C 781 Before the Honorable George N. Leighton, United States District Judge.

ORDER

This cause is before the court on the motion of respondent GTE-Automatic Electric Company to dismiss this action for mootness. The motion is granted. It appears from the record that all issues raised by the Petition for Arbitration have been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local # 336, International Brotherhood of Electrical Workers, AFL-CIO,* Case No. 13-UC-87 (November 30, 1976), and by subsequent collective bargaining between the parties. Accordingly, this suit is dismissed.

So ordered,

/s/ George N. Leighton
George N. Leighton, United States District Judge

January 31, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1435

LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

vs.

GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

BRIEF OF GTE-AUTOMATIC ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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LOCAL 336, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
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GTE-AUTOMATIC ELECTRIC COMPANY,
Respondent.

BRIEF OF GTE-AUTOMATIC ELECTRIC COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, GTE-Automatic Electric Company, respectfully urges that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW.

The Order of District Judge Leighton of the United States District Court for the Northern District of Illinois dismissing the Petition of Local 336, International Brotherhood of Electrical Workers, AFL-CIO, is reprinted as Appendix B to the Petition for Writ of Certiorari.

The unanimous and unpublished Order of a panel of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court is reprinted as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION.

The Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court and the Court of Appeals on review erred in dismissing the Petition to Order Arbitration on the basis that all issues raised by the Petition to Order Arbitration had been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO*, 226 NLRB 1222 (1976), and by subsequent collective bargaining between the parties.

STATUTES INVOLVED.

This action involves the United States Code of Arbitration, Title 9 U. S. C. § 4, and Section 301 of the Labor Management Relations Act, Title 29 U. S. C. § 185(a).

STATEMENT OF THE CASE.

This case arose upon the filing by Petitioner of a Petition to Order Arbitration under 9 U. S. C. §§ 1, 4, 5 and 6 and under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 *et seq*. The issues to be arbitrated are stated in the Petition To Order Arbitration as follows:

1. The "question of the Union's right and the Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries."
2. The Company's "obligation to bargain with respect to the effect these members (the members of the bargaining unit so assigned in foreign countries) would have on other members of the bargaining unit when they return to the States."[1]

Petitioner now petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to obtain review of that Court's Order of November 21, 1978, wherein the court, in affirming the Judgment of the District Court, held that the issues raised by the Petition to Order Arbitration had been resolved by a decision of the National Labor Relations Board and by subsequent bargaining between the parties. The Seventh Circuit further held that the issue the Petitioner now seeks to submit to arbitration, the status of an individual terminated from his employment while working in a foreign country, is a new issue which was not raised in the pleadings nor had the Petitioner demonstrated that it had "availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration." (The unpublished decision of the Seventh Circuit is contained at the Appendix, A1 to A5, of the Petition filed with this Court).

COUNTERSTATEMENT OF FACTS.

Respondent (also referred to as the "Company") is engaged in the manufacture and installation of telephone and other types of communications equipment. The Petitioner (also referred to as "Local 336") is the bargaining representative for a group of telephone equipment installers in various classifications employed by Respondent. Over the years the parties have entered into a series of collective bargaining agreements regarding the wages and working conditions of those installers.

On March 2, 1976, Petitioner filed its Petition to Order Arbitration, pursuant to Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185 *et seq*., and the United States

1. Noted in the Court of Appeals decision contained in the Petition, Appendix A, p. 3.

Code of Arbitration, 9 U. S. C. §§ 1, 4, 5 and 6. As set forth in paragraph 8 of that petition, and appendices "B" and "D" attached thereto, Petitioner demanded arbitration under the collective bargaining agreement between the parties of the "question of the Union's right and the Company's obligation to bargain over wages, hours and working conditions of members assigned to work in foreign countries." The Union also demanded arbitration of the "Company's . . . 'obligation to bargain with respect to the effect these members (the members of the bargaining unit so assigned in foreign countries) would have on other members of the bargaining unit when they return to the States.' "[2]

Following the filing of the Petition to Order Arbitration, the Respondent filed with the National Labor Relations Board a petition seeking clarification of the bargaining unit represented by Petitioner, pursuant to Section 9(b) of the National Labor Relations Act, as amended, 29 U. S. C. § 185 *et seq.* A hearing was held and on November 30, 1976, the NLRB granted Respondent's Petition and ruled that installers working in foreign countries are not encompassed within the unit represented by the Petitioner and are not covered by the collective bargaining agreement between the parties. *GTE-Automatic Electric Incorporated, and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO,* 226 NLRB 1222 (1976).

Thereafter, on November 11, 1976, following the NLRB decision, the parties reached agreement on the effects which result from having persons leave the bargaining unit to work in foreign countries and subsequently return to the United States. (See agreement on "effects," quoted in the Court of Appeals decision contained in the Petition, Appendix, A4.)

On the basis of the Board decision and the agreement on effects, Respondent moved to dismiss the Petition to Order Arbitration on the basis that as a result of the NLRB decision and the agreement reached between the parties, the issues raised by the Petition were now moot. On January 31, 1978, the Honorable Judge George N. Leighton granted Respondent's Motion to Dismiss, holding that "[i]t appears from the record that all issues raised by the Petition for Arbitration have been mooted by the decision of the National Labor Relations Board in *GTE-Automatic Electric Incorporated and Local No. 336, International Brotherhood of Electrical Workers, AFL-CIO,* Case No. 13-UC-87 (November 30, 1976), and by subsequent collective bargaining between the parties" (Petition, Appendix A6).

2. Petition to Order Arbitration, contained in the record filed with the United States Court of Appeals for the Seventh Circuit, at A5-10.

The Seventh Circuit Court of Appeals unanimously affirmed the decision of the district court that all issues raised in the Petition to Order Arbitration had been resolved and that the Petition to Order Arbitration should be dismissed. Noting that the Petitioner was now seeking to arbitrate an issue separate and distinct from those raised in the Petition to Order Arbitration and that Petitioner had never sought to amend the pleadings to encompass the new issue, the Seventh Circuit stated:

> "We affirm the court's judgment. The NLRB determined the first issue, bargaining rights of foreign employees, and the parties negotiated the second, namely the effect that foreign assignments have on the remainder, or other members, of the bargaining unit. The Union on appeal has sought to add a new issue: the rights of employees who prematurely leave their foreign assignment or are discharged from foreign employment. The pleadings were never amended nor sought to be amended to encompass this new issue. Board Member Jenkins' dissent in the Board case did not change the issues before the district court. Equally importantly, the Union has not availed itself of the grievance procedure under the collective bargaining agreement, which is prerequisite to arbitration, or a petition to order arbitration. ***Republic Steel***

Corp. v. *Maddox*, 379 U. S. 650 (1965); *Vaca* v. *Sipes*, 386 U. S. 171 (1967)."

Judgment affirmed.

(Petition, Appendix, A4-5.)

ARGUMENT.

The Petition For Writ of Certiorari Suggests No Issues Which Warrant Review for Any of the Reasons Set Forth in Rule 19 of the Supreme Court Rules.

The issues raised in the Petition for Arbitration are set forth at pp. 2-3 *supra*. Apparently conceding that these issues have been resolved and that it no longer seeks an order compelling their submission to arbitration, Petitioner nevertheless argued before the Court of Appeals and now to this Court that it should be entitled to an order compelling the submission to arbitration of a separate and distinct issue.[3] At no time, however, has Petitioner ever sought to amend the pleadings to encompass this new issue, preferring instead to argue that a court should be without authority to consider the scope or mootness of the issues raised in a Petition to Order Arbitration. The Petitioner's position, however, flies in the face of all established notions as to the appropriate role of a court entertaining a Petition to Order Arbitration and, if adopted, would make a mockery of the equity powers of a court in connection with actions of this nature.

Thus, it has long been established that a court, before issuing an order compelling arbitration, must find, as a matter of law, that the petitioner's claim is governed by the contract involved and is within the scope of the agreement to arbitrate. *United*

3. That the Petitioner now seeks the submission to arbitration of a separate and distinct issue from those raised in the Petition to Order Arbitration is readily apparent. The generic issues raised in the Petition to Order Arbitration are noted in the Court of Appeals decision at A3. In its Petition For Writ, however, the Petitioner describes the issue it seeks to submit to arbitration as an individualized issue, relating to the termination and status of a certain (unnamed) individual (P. Br. 7-9).

Steelworkers of America v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960). Such a determination clearly can only be made following a review of the contract involved and an evaluation of the scope of the issues raised. To contend that the court is without authority to consider the scope of the issues is to ignore this fundamental requirement.

Similarly, it is also well established, contrary to the Petitioner's contentions, that the party petitioning for arbitration must demonstrate that it has fulfilled its own contractual commitments before seeking equitable relief in the courts to compel arbitration. A petitioner which has not properly availed itself of the contractual grievance procedure for the resolution of its claim has failed to live up to the terms of the contract on its own part and has no grounds to request a court to compel arbitration. *Republic Steel Corporation* v. *Maddox*, 379 U. S. 650 (1946); *Dill* v. *Greyhound Corporation*, 435 F. 2d 231 (6th Cir. 1970), *cert. denied*, 402 U. S. 952 (1970); *OCAW Local 2-477* v. *Continental Oil Co.*, 524 F. 2d 1048 (10th Cir. 1975); *Oil Workers* v. *Oil City Brass Works*, 83 LRRM 2959 (E. D. Tex. 1972), *aff'd.*, 479 F. 2d 1048 (5th Cir. 1973).

In the instant case the Petitioner has never demonstrated that it has availed itself of the grievance procedure prior to seeking an order compelling arbitration of the new issue it raised subsequent to the filing of its Petition to Order Arbitration. In contending as it does at pp. 7-8 of its Petition to this Court that the lower court was in error in not developing a record that Petitioner had not complied with the grievance procedure, Petitioner improperly attempts to shift from itself to the court the burden to properly develop a record to justify the issuance of an order.

Equally absurd is Petitioner's claim that the courts should be without authority to consider the mootness of the issue(s) raised. That veiwpoint utterly ignores the long and continuing history of Supreme Court adherence to the jurisdictional limita-

tions created by Article III of the Constitution. The Supreme Court has interpreted Article III as establishing the minimal jurisdictional requirements for all federal courts. *Flast* v. *Cohen*, 392 U. S. 83 (1968). Thus, the Constitution limits the scope of federal judicial power to those cases in which an actual "case or controversy" is present. *Benton* v. *Maryland*, 395 U. S. 784, 89 S. Ct. 2056 (1969); *S. E. C.* v. *Medical Committee for Human Rights*, 404 U. S. 403, 92 S. Ct. 577 (1972); *O'Shea* v. *Littleton*, 414 U. S. 488, 94 S. Ct. 669 (1974).

The Court has noted on many occasions that federal courts must strictly adhere to the Article III limitation. As stated in the case of *United States* v. *Richardson*, 418 U. S. 166, 94 S. Ct. 2940 (1974):

> "As far back as Marbury v Madison, 1 Cranch 137, 2 L. Ed. 60 (1803), this Court held that judicial power may be exercised only in a case properly before it—a 'case or controversy' not suffering any of the limitations of the political-question doctrine, *not then moot* or calling for an advisory opinion." (418 U. S. at 171.) (Emphasis added.)

It is therefore clear that under the terms of Article III of the Constitution federal courts are without authority to consider any aspect of a controversy once it becomes moot.[4] The Petitioner's contention that a court should ignore the issue of mootness flies in the face of this fundamental legal principle.

In sum, it should be emphasized that Respondent does not seek to disturb the well established principle that the primary responsibility to apply a contract and to rule upon the merits of a claim rests with the arbitrator. By the same token, if adopted, Petitioner's logic would strip the courts of all responsibility in considering petitions to order arbitration and would reduce the role of courts to mere rubber stamps in such matters. Clearly the courts must retain the responsibility to determine that the issues raised are subject to the contract and to the agreement to arbitrate and that a "case or controversy" exists prior to compelling the parties to submit the issues to arbitration. The Petitioner's arguments in this regard are clearly without merit and do not warrant review for any of the reasons set forth in Supreme Court Rule 19.

4. *See Powell* v. *McCormack*, 395 U. S. 486, 89 S. Ct. 1944 (1969).

CONCLUSION.

Relying upon the liberal policy in favor of arbitration, the Petitioner in this matter has improperly sought on appeal to amend the issues raised in its Petition To Order Arbitration and contends that an order should be issued compelling the Respondent to submit a new and distinct issue to arbitration. The Court of Appeals properly restricted its reviews to the issues raised in the Petition To Order Arbitration and held that the lower court was correct in concluding that an order compelling arbitration was not justified. The Court of Appeals also properly held that the issue Petitioner now seeks to arbitrate is new and distinct from those raised in the Petition To Order Arbitration and that Petitioner should not be entitled to use the original Petition as a vehicle to seek an order compelling arbitration of a new and distinct issue. This is especially true when, as here, Petitioner has not properly pled that it has fulfilled its own contractual obligations with regard to this new and distinct issue. The Petition for Writ of Certiorari should now be denied and the decision of the United States Court of Appeals for the Seventh Circuit should be allowed to stand.

Respectfully submitted,

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